

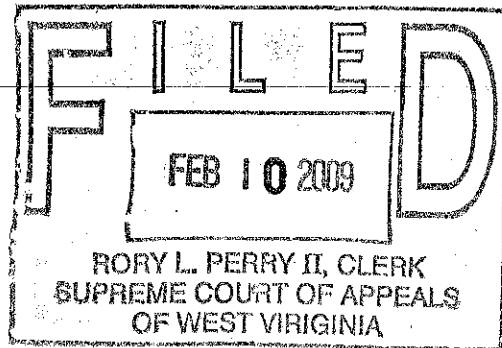
IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Charleston, West Virginia

State of West Virginia ex rel.,
James L. Knotts, Petitioner

vs.) No. 3467

The Honorable Richard Facemire,
Judge of the Circuit Court of Clay
County and Kelly Hamon, Special
Prosecuting Attorney of Clay County,
Respondents



RESPONSE TO RULE TO SHOW CAUSE FOR
A WRIT OF PROHIBITION

Kelly Hamon McLaughlin
WV State Bar No. 7453
Special Prosecuting Attorney of Clay County
PO Box 118
Sutton, WV 26601
304-765-3880

SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia, ex rel.,
James L. Knotts, Petitioner

vs.) No. 34647

The Honorable Richard Facemire, Judge
of the Circuit Court of Clay County and
Kelly Hamon, Special Prosecuting Attorney
of Clay County, Respondents

**RESPONSE TO RULE TO SHOW CAUSE FOR
A WRIT OF PROHIBITION**

Comes now Respondent Kelly L. Hamon, Special Prosecuting Attorney of Clay County, West Virginia, to respond to a rule to show cause for a writ of prohibition, which was filed by Petitioner after the Honorable Richard Facemire, Judge of the Circuit Court of Clay County, West Virginia denied Petitioner's Motion to Quash at a hearing on January 5th, 2009, and states the following in support thereof.

**I.
STATEMENT OF THE CASE**

This respondent does not dispute the statement of the case as outlined in Petitioner's writ of prohibition insofar as the recitation of the contents of the indictment and the fact that the then acting Sheriff and Prosecuting Attorney of Clay County, West Virginia respectively had knowledge of the allegations against Petitioner Knotts as early as 1995. This respondent further agrees that the parents of the then thirteen year old victim informed the Prosecuting Attorney of Clay County that they did not want to pursue criminal charges. However, respondent further adds the parents did so because they wanted to spare the minor child from testifying at a trial.

Respondent further adds that on or about September 13, 2006, Senior Trooper J.T. Portillo of the West Virginia State Police initiated a criminal investigation regarding an alleged unrelated sexual assault by the petitioner in this matter, James Knotts, against his niece, Jessica Nicholas. During that investigation, Trooper Portillo was advised that Petitioner Knotts had been accused of sexually abusing another niece, Allison Nicholas, years prior. In an attempt to ascertain the validity of the new complaint, Trooper Portillo contacted Allison Nicholas, the now adult victim in this proceeding. Trooper Portillo questioned Allison Nicholas regarding the allegations concerning Petitioner Knotts and inquired whether she would be willing to cooperate with the investigation. Allison Nicholas agreed to give a statement and as a result of her cooperation, the petitioner was arrested and subsequently indicted.

II. ARGUMENT

At issue is whether the petitioner's due process rights as protected by the Fifth Amendment to the United States Constitution and Article III, Section 10 of the West Virginia Constitution require a dismissal of the indictment due to the delay of the institution of criminal proceedings. The cases of State ex rel. Leonard v. Hey (W.Va.), 269 S.E.2d 394 (1980) and Hundley v. Ashworth, 181 W.Va. 379, 382 S.E.2d 573 address the issue of preindictment delay. In Leonard v. Hey (W.Va.), 269 S.E.2d 394 (1980), Syllabus Point 1, this Court found that a delay of eleven years between the commission of a crime and the arrest or indictment of a defendant, his location and identification having been known throughout the period, is presumptively prejudicial. However, this Court went on to announce that the presumption can be rebutted. Id. at Syllabus Point 1.

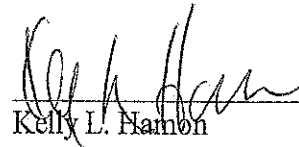
In Hundley v. Ashworth, 181 W.Va. 379, 382 S.E.2d 573, this Court explained that even with a case of presumptive prejudicial delay wherein the burden shifts requiring the State to rebut the presumption of prejudice, the State in rebutting the prejudice need only show that the delay was not deliberately designed to gain a tactical advantage over the defendant. *See Id.* at W.Va. 382. Specifically, this Court held, "Furthermore, even in those limited situations where *Leonard* does apply, the State in rebutting the prejudice need only show that the delay was not deliberately designed to gain a tactical advantage over the defendant. Once this is shown, the defendant is not entitled to prevail on a motion to dismiss the indictment under a due process claim for delay." *Id.* at W.Va. 382.

Presuming the petitioner is prejudiced by a pre-indictment delay exceeding eleven years, such presumption can be rebutted by a showing that the delay was not deliberately designed to gain a tactical advantage over the defendant. In fact, the delay was in no way designed by the State, as evidenced by Petitioner's own Statement of Facts. Clearly, the prosecutor chose not to act, but not as a tactical design but rather to honor the request of the victim's parents. Furthermore, the State did not designedly reopen the case against Petitioner Knotts years later but rather it was the result of Trooper Portillo's investigation into new, unrelated allegations that caused the case to finally result in the institution of criminal proceedings. Nothing in the record indicates a deliberate delay, but instead a delay caused by the actions of the parents of a minor child victim through no fault of her own and the subsequent inaction of authorities.

III.
PRAYER

WHEREFORE, this respondent respectfully requests that the relief prayed for by
Petitioner in this original proceeding be denied.

Respectfully submitted,



Kelly L. Hamon
Special Prosecuting Attorney
WV State Bar #7453
PO Box 118
Sutton, WV 26601
304-765-3880